91-1952

No._____

Supreme Court, U.S.
FILED
FEB 20 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

February, 1992

MEHRDED TABRIZIAN, *Petitioner*

v.

BHARAT MODY and CHAMPA MODY, *Respondent*

FROM THE SUPREME COURT OF NEW MEXICO

WRIT OF CERTIORARI

MEHRDED TABRIZIAN
4700 Brockwood N.E.
Albuquerque, NM 87109
(505) 883-9529
pro se

Supreme Court, U.S.
FILED
FEB 20 1992
OFFICE OF THE CLERK

QUESTIONS PRESENTED

(1) Introduction: At the time the Petitioner filed his brief in chief in the New Mexico Supreme Court, the opposing counsel of the trial already was elected to the New Mexico Supreme Court, Justice Gene Franchini. Petitioner in post trial motion for a new trial, and in his brief in chief before the New Mexico Supreme Court, attacked the above counsel of then the record for misrepresentation, coaching witness into false testimony, harassment of the petitioner's witness outside the court, and manipulating the trial Judge. The New Mexico Supreme Court ignored these conflicts and in a decision that by and large, was bias and prejudice, concurrently affirmed the judgment below. It thus expressly has rejected the equal protection of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

(2) Trial Court Judge, by and large was bias and prejudice on the following grounds:

a) for insisting that petitioner compromise and wash off the case on the morning of August 6, 1990 immediately before the trial and after petitioner already had refused to do so on opposing counsels' request.

b) for its jury instruction which was insufficient and unfair, as deny of trial by jury as of right.

c) for unfair treatment of the petitioner vs. opposing counsel in the post trial hearing on October 25, 1990.

d) for adopting a finding of facts and conclusion of law which was not supported by substantial evidence.

TABLE OF CONTENTS

Page

Opinions below 2
Jurisdiction 3
Constitutional provisions and rules . . 3
How the federal question was raised . . 3
Statement of the case 6
The question is substantial 12
Conclusion 53
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Armstrong v. Industrial Electric & Equipment Services, 92 NM 272, 275 (ct app. 1981) 39

Bank of New Mexico v. Northwest Power Products 95 NM 743 (ct. app.) 42

Embry v. Galentin, 76 NM, 719, 418, p. 2nd 62 (1966) 39

Strong v. Shaw, 96 NM 281, (ct. app.) . 40

Rules:

New Mexico Rules
- Section 57-12-1 to 57-12-22 36
- Section 12-1-2-22 A 36
- Section 12-1-4-13 E 44
- Section 1-051 I 37
- U.J.I. 13-820 43
- U.J.I. 13-814 42

JURISDICTIONAL STATEMENT

Mehrded Tabrizian, the petitioner, seeking review of the final judgement of the Supreme Court of New Mexico, dated November 27, 1991. Holding that New Mexico Supreme Court ruled and affirmed the lower court decision in a bias and prejudice fasion. This is violative of petitioner's right of equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico, which appears in the appendix attached, dated November 27, 1991.

The findings of the fact and conclusion of the law of the Second Judical District Court, County of Bernalillo, State of New Mexico, dated August 14, 1990, appears also in the appendix attached.

JURISDICTION

The judgement of the Supreme Court of New Mexico, affirming the judgement against petitioner was entered on November 27, 1991.

This petition is being docketed in this Court within 90 days from the date of the decision below. The jurisdiction of this Court is involked under 28 U.S.C. - 1257.

CONSTITUTIONAL PROVISIONS AND RULES

Equal protection of the law, guaranteed by the Fourteenth Amendment

---

Right to a jury trial, is guaranteed by the Seventh Amendment.

* * * *

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

At the two (2) post trial motions for new trial, petitioner raised the claim that: 1) New evidence had been discovered which proved misrepresentation, false testimonies and other

misconduct by adverse party. 2) The claim was raise that the jury instructions were insufficient and unfair. Petitioner also filed a motion to amend the judgment. At the first post trial hearing, on October 15. 1990, a different young attorney for the respondents/appellee was present. She argued that because petitioner/appellant had already filed a notice of appeal the trial court did not have jurisdiction to hear the motions. Petitioner argued that Notice of Appeal was null because a timely motion to amend the judgment was pending, and therefore judgment was not final, thus could not be appealed. The Judge postponed the hearing until further review of the points. Petitioner several times requested to set a time for rehearing. Finally, on October 23, 1990, a rehearing was scheduled at opposing counsel's request, for October 25, 1990. At this hearing, both the counsels for respondent/appellees were present.

This time the opposing counsels argued that

since no decision was made within thirty (30) days, motions automatically were denied and trial court did not have jurisdiction over this case. The Judge agreed and motions were denied. However, at the end of this hearing the Judge ruled on the motion to amend the judgement and reduced the judgement by $2480.00, the amount previously paid by petitioner in the form of last months rent.

Petitioner then appealed to the New Mexico Supreme Court. There he renewed his motion for a new trial in the following manners:

> 1. "The trial court committed reversible error in its jury instruction for two independent reasons. a) The trial Judge's failure to instruct the jury on multiple counts where different points of law at action as error: b) Trial court committed reversible error by not instructing on the counter claim, denial of Right by Jury."
>
> 2. Petitioner/appellant requested findings of the fact and conclusion of law was supported by substantial evidence, but the trial court adopted contrary findings of the fact and conclusion of law identical to the one filed by opposing counsel.
>
> 3. The trial Judge was bias and prejudice against petitioner/appellant: a) for insisting that petitioner/appellant compromise and wash off the case on the

morning of August 6, 1990, immediately before the trial started. (b) unfair treatment of petitioner/appellant vs. opposing counsel at the post trial hearing on October 25, 1990.

4. Petitioner/Appellant then raised the claim that new evidence had been discovered after the trail that proved misrepresentation, false testimoney and other misconduct of the adverse party during the trial."

The New Mexico Supreme Court, despite the conflict mentioned, in a bias and prejudice decision, affirmed the trial courts rulings. It thus, stole petitioner's trust and expressly rejected petitioner's right to equal protection of law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

On or about April 19, 1988, Petitioner Mehrded Tabrizian and Respondents Bharat Mody and Champa Mody, entered into a lease agreement for a restaurant space inside the Trade Wind Motel with petitioner as the lessee and respondent as the lessor. In consideration of two months free rent, petitioner paid

respondent $2480.00 for last months rent and he also renovated the leased premises at the cost of approximately $7,500.00 and in three (3) weeks opened the restaurant for business. After petitioner opened the restaurant, it became apparent that the Trade Wind Motel was a center of criminal activities and that respondent either knowingly and willingly or passively allowing the Trade Wind Motel to be used as a center for prostitution, drugs, public out door alcohol consumption and other serious criminal activities. As a result, petitioner was deprived of the peaceable, quiet and exclusive use of the rental premises described above and in addition, his restaurant was severely damaged and petitioner was forced to cease business in mid August. On August 30, 1988, petitioner filed a complaint for breach of contract, rescission, fraud, nuisance and unfair trade practices. The relevant facts that led to this complaint may be fairly summarized as follows:

1. The Petitioner Mehrded Tabrizian had

worked in the restaurant business since 1975 where he worked his way up from a bus boy to a management position. In 1986 petitioner was hired as a manager by a local restaurant chain named Little Anita's. There he was promoted to the general manager position where he was responsible for the management of 3 restaurants with 6 managers and approximately 85 employees under his authority. He worked in this position until April of 1988.

2. Petitioner's ultimate goal was that some day he would open his own restaurant. On or about April of 1988, petitioner found out about a restaurant for lease in a motel named The Trade Wind. He then contacted the owner of the motel, Bharat Mody, the respondent.

3. Petitioner met with respondent two (2) or three (3) times. Respondent convinced petitioner that the subject restaurant space was an ideal for family restaurant and that the previous tenant had been very successful and the reason they left was because respondent did not

have a liquor license.

4. Petitioner saw an opportunity to own his own restaurant. He then gave his two weeks notice to his employer and on April 19, 1988 he entered into a lease agreement with the respondent for the restaurant space which shared common restrooms, parking facilities and entrance with the Trade Wind Motel.

5. After petitioner opened his restaurant and began operation it became apparent that the Trade Wind Motel was a center of prostitution, drug use and public alcohol consumption.

6. Respondent and his employees constantly and repeatedly rented rooms in the motel for what they knew or should have known were for purposes of prostitution, thereby promoting prostitution. Alicia Aguero[1], who

---

[1] Alicia Aguero (Mexican by orgin) worked at the Trade Winds Motel for seven (7) years. During this period respondent deducted Federal and social security taxes from her wages every pay period and kept the money instead of reporting to I.R.S. For seven (7) years Alicia did not receive a W-2 form. On June 1988, Alicia was injured on the job. Respondent refused to file Worker's Comp. claim. It took seven (7)

worked at the Trade Wind Motel for seven (7) years as a cleaning woman, testified that, in fact, respondent and their employees often charged more than the normal rate in such cases.

7. During the three and a half (3½) months that petitioner operated his restaurant, the motel was targeted for two police undercover operations focusing on prostitution. These sting operations were very successful, however, they generated a lot of bad publicity.

8. During the 3½ months that petitioner operated the restaurant, there were 62 police reports consisting of rape, assault with a deadly weapon, drug overdose, child abuse, and prostitution offenses. (Police reports are included in the record.)

9. Petitioner complained to respondent several times concerning alcohol consumption in the parking lot and swimming pool area and was ignored.

---

months and two (2) attorneys to secure her rights.

10. Respondent gave away free breakfasts to his tenants in direct competition with petitioner's business despite the fact that the lease agreement provided for petitioner the exclusive right to serve food on the premises.

11. When petitioner approached respondent about the free breakfast, respondent became aggressive and hostile. Thereafter, it was impossible for the petitioner to discuss anything with respondent.

12. Things got worse. Their employees started to bring their pets to the lobby and walked around the lobby barefooted right in front of the entrance to the restaurant.

13. Due directly to the criminal activity, unsavory actions, and hostile atmosphere, condoned and promoted by respondent, petitioner closed his business in mid August, 1988, even though his rent was paid in full until September.

On August 30, 1988 petitioner by and through his first attorney, Paul A. Hoffman, filed a

complaint against the respondents for breach of contract, recession, fraud, nuisance, and unfair trade practices. After the case was set for trail, Paul Hoffman told petitioner that the Judge assigned to this case was an excellent choice because he hated criminals. The record shows that the original Judge was replaced due to the special nature of the case. After the trail, petitioner spoke with a clerk of the appellant court, he told the petitioner that Judge Cosgrove has the worse record among all the Judges in District Court of Bernalillo County for reversal on appeals. How can one have the worst record and yet be specialized at the same time?

THE QUESTIONS ARE SUBSTANTIAL

POINT I

We will begin with the analysis of the New Mexico Supreme Court decision. We will code a part or a section of the decision that either is contradicting to the material facts or is bias

and prejudice. We will then challenge this part with an argument. These arguments are as follows:

a) Decision, Appendix Page 1a, Line 21 reads: "Appellant advances six arguments as his basis for appeal: (1) The trial court erred by failing to use appellant's proposed jury instructions."

Argument: This is all wrong, this is not what petitioner argued. Petitioner argued; code;

> "Point 1: The trial court committed reversible error in it's instructions for two independent reasons.
> A. Trial Judges' failure to instruct the jury on multiple counts where different points of law at action as error.
> B. Trial Judge committed reversible error by not instructing on counterclaim, denial of Trial by Jury."

The complete discussion of this point as was raised below is included in Point II of the argument. This gross mis-interpretation of Point 1 of petitioner's brief is bias and prejudice. The decision also misinterpreted Point (6) of the petitioner's brief in cheif in the following manner.

b) Decision Appendix Page 2a, Line 12 reads: "and, (6) The trial court erred when it refused to rule on two post trial motions

because it lacked jurisdiction."

Argument: Point (6) of the petitioner's brief in chief does not mention or even imply to what the decision suggests. This part of the decision is absolutely contradicting to the record.

c) Decision, Apendix Page 2a, Line 16 reads: "On April 19, 1988, appellant, Mehrded Tabrizian, signed a rental agreement for restaurant space adjacent to the Trade Wind Motor Hotel."

Argument: The restaurant was not and is not adjacent to the motel. It is inside and surrounded by the motel. In fact, if the restaurant was adjacent to the motel, petitioner would not have half as many claims as he has. If the restaurant was adjacent to the motel, then petitioner could have controlled his destiny. He could have decided who comes or goes to his place of business. He would have been effected by the problems described in statement of the case, only from one side rather than be surrounded by them.

The location of the restaurant with respect

to the motel is reflected in the record in numerous places. In the lease agreement and in the proceedings. It can best be described during cross examination by petitioner's trial counsel from Donald Phoenix. (Vol. I, Tr 118)

> Q. And in order to get into the motel--to the restaurant from the parking lot, you have to walk through the lobby of the motel, right?
>
> A. Right, in order to get to the restaurant, you have to walk through the lobby.
>
> Q. Was that the only way to get---
>
> A. The only entrance?
>
> Q. Yeah
>
> A. That is the only entrance. You had to come through the lobby to get to the restaurant.

Then again during cross examination by petitioner's trial counsel from Margrette Thompson. (Vol. I, Tr 36)

> Q. So, all of their customers had a right to use all of the parking lot; right, and they did.
>
> A. Yes.
>
> Q. And they had to come in through your lobby; right?

A. Yes.

Q. And past the desk?

A. Yes.

The above part of the transcript shows clearly that the restaurant was inside, not adjacent to the motel, thus, the above part of the decision is contradicting to the material fact.

d) Decision, Appendix Page 3a, Line 4 reads:
"At first the business seemed to prosper; however, in August 1988 Tabrizian suddenly closed his business and abandoned the lease."

Argument: The meaning of sudden, according to the American Heritage Dictionary is: "Happening quickly and without warning." However, this is not the case here. During the three and one half (3½) months that petitioner operated his business, there were a lot of problems. (See Statement of the Case). There were also a lot of bad publicity and criminal activities surrounding the petitioner's business due directly to action of respondent for condoning and promoting prostitution, drug use and other criminal activities. It thus frustrated the

purpose of the contract embodied in the lease agreement and forced the petitioner to cease business. These events were described in the Brief In Chief before the New Mexico Supreme Court. Thus, this part of the decision is bias and prejudice because. The word "suddenly" is there to attack the petitioner/appellant.

e) Decision, Apendix Page 3a, line 8 reads: "On August 30, 1988, Tabrizian filed a complaint for breach of contract, rescision, fraud, nuisance, and unfair trade practices. Mody filed an answer and a counter claim alleging non-payment of rent. A jury trial was held on Tabrizion's claims; Mody prevailed."

Argument: The record clearly shows that the jury did not decide on Tabrizian's claims. They decided on a claim, the breach of contract. The remaining four claims are still unresolved.

This point was raised in a post trial motion and was renewed before the New Mexico Supreme Court. Thus, the use of word "claims" rather than "claim" is there to coverup the problems.

f) Decision, Appendix Page 3a, line 19 reads: "Tabrizian filed a motion for a new trial on August 24, 1990 and a notice of appeal on September 17, 1990. He filed another motion for a new trial on September 18, 1990. On October 25, 1990, the trial court held that

the filing of the notice of appeal terminated its jurisdiction to hear the motions. Tabrizian now appeals the trial court's decision."

Decision, Appendix Page 10a, Line 4 reads: "When Tabrizian filed his notice of appeal, the trial court lost jurisdiction to decide motions of this sort, whether filed before or after the notice of appeal.

Decision, Appendix Page 11a, line 17, reads: "Appellant filed two sprarate post judgment motions, on August 24, 1990 and on September 18. 1990. The trial court did not hear the motions until October 25, 1990, more than thirty days after the filling of the second motion."

Argument: There is more to it than this. In addition, Tabrizian/petitioner also filed a motion to amend judgment on August 24, 1990, ten (10) days after the final judgement. In addition there was also a hearing on the motions on October 5, 1990, where a different counsel for respondent/appellee was present. At this hearing she argued that because petitioner has filed a notice of appeal, the trial judge did not have jurisdiction over the case. Petitioner argued that notice of appeal was null because a timely motion to amend the judgment was pending. Thus the judgement was not final and it can not be

appealed. The Judge postponed the hearing for further review of the points. (October 5, 1990 hearing, Tr 1 thru Tr25), petitioner unsuccessfully several times requested to set a time for rehearing. Finally rehearing was scheduled on opposing counsel request for October 25, 1990. At this hearing both counsels for respondent were present. This time they argued that because no decision was made within 30 days motions automatically were considered denied and the trial Judge did not have further jurisdiction over the case. Judge agreed and motions were denied. However at the end of this hearing, the Judge ruled on the motion to amend the judgment and reduced the judgement by $2480.00, the amount previously paid by petitioner in the form of last months rent. (Hearing October 25, 1990, Tr 1 thru Tr22). This proves that timely motion to amend the judgment was legitimate and therefore judgement was not final. Thus, the notice of appeal was null and the trial judge erred when he did not hear the

motions on October 5, 1990. The New Mexico Supreme Court realized the problem and by being silent about the motion to amend the judgement, which effected the finality of the judgment it thus intended to cover up the error of the trial judge.

g) Decision, Appendix, Page 4a, line 12 reads: "Repeatedly, appellant has reminded us that he is unschooled in the law and has suggested that, as a result, he should be accorded special consideration."

Argument: Petitioner/Appellant did not ask for any kind of consideration except to be treated fairly. This part of the decision simply setting the stage for continuous and none stop attacks on the petitioner.

h) Decision, Appendix Page 7a, line 12 reads: "finally, the evidence supported a jury finding that Tabrizian's business failure was due to his own inexperience and mis-management. The record indicated that Tabrizian had prior restaurant management experience but had never run his own business. Mody presented evidence of prior and current restaurants that succeeded in the space vacated by Tabrizian."

Argument: It is very unclear as to what evidence the decision is talking about! Jury never made such distinction as Tabrizians

failure was due to his own inexperience and mismanagement. Decision repeatedly has mentioned alleged evidence presented by Mody, the respondent, but it has failed to show any of these evidences. Paragraph "i" of this argument shows that the only evidence Mody presented was misrepresentations aimed to influence the jury.

i) Decision, Appendix Page 8a, line 6 reads: "Tabrizian next argues that he was prejudiced by the trial court's failure to adopt his proposed jury instructions and by inappropriate actions of the trial judge and opposing counsel, but any error of this sort must have been preserved at the trial."

Decision, Appendix Page 9a, line 20 reads: "[1]Moreover, we have read the transcript of the proceedings and do not find any evidence of improper behavior by either the judge or opposing counsel."

Argument: This part of the decision clearly denying "The right to a new trial based on newly discovered evidence." Based on newly discovered evidence, in two post trial motions and before the New Mexico Supreme Court, petitioner loudly and clearly attacked the opposing counsel for misrepresentation and coaching the witnesses into false testimony.

These evidences were presented in the following manner:

1. During the cross examination from petitioner, trail counsel misrepresented the petitioner, the respondents and the petitioner's star witness Alicia Agular all at the same time. (Vol. II, T10 thru Tr 11).

Q. Were you represented at the time of the deposition by Mr. Paul A. Hoffman?[2]

A. Yes.

Q. Is that the same lawyer who is now representing Alicia Aguero?

Mr. Barron: Objection, Your Honor.
The Court: I'm going to overrule the objection.
The witness: Yeh, I believe it is, yes.

Q. Did you send Ms. Aguero to Mr. Hoffman to represent her in that Workmens Compensation case?

A. Yes, I did. She came to me and said she hurt herself and Mr. and Mrs. Mody told her they were not going to pay any money. And I know she hurt herself on the job. And being in this business, I felt sorry for her and I sent her to an attorney. And I'm glad I help her because she got Workmen's Compensation now, which she deserves.

---

[2] However, at the time of the trial, Paul A. Hoffman was practicing law at the office of opposing counsel.

Q. She was getting Worker's Compensation from two weeks after the accident, wasn't she?

A. When, I didn't know. You have to talk to Mr. Hoffman. I don't think so. He did refuse to pay her any money. That's what she told us--

After the trial, petitioner obtained a copy of Fryar Analysis Memorandum from the New Mexico Department of Labor, Worker's Compensation Division. This memorandum shows that Alicia Aguero hurt herself on the job on June 4, 1988. This document clearly shows that no offer of settlement was made until November 18, 1988 and that Mody contested the entire claim until approximately two (2) days before the trial.

It took Alicia two (2) attorneys and approximately seven (7) months to receive this basic benefit, at least what she desearved after seven (7) years of hard work, with social security and Federal taxes deducted from every paycheck, which Mody did not report but kept for himself.

This clearly proves that opposing counsel

voluntary brought up the issue of "the two weeks" and then used it and misrepresneted Mody, Tabrizian, and Alicia all at the same time. (1) He misrepresented Mody to the Jury by showing him as a very nice man who took care of Alicia, immediately only two (2) weeks after she hurt herself at the job. (2) He misrepresented the petitioner to the jury by showing that he was after these very nice people and caused problems for them by introducing attorneys to their employee without any justification, especially since they voluntarily released the Workman's Compensation benefit only two weeks after the accident and (3) He misrepresented and shattered the credibility of petitioner's star witness, Alicia Aguero by showing to the jury that there was not a need to hire an attorney and make Mody's life miserable, especially after they offered to take care of her immediately only two weeks after she got hurt, and showed to the jury that her motive was wrong then when she hired an attorney and her motive is wrong now by

being here and saying all these lies about these very nice people. Of course the jury, was going to believe opposing counsels words over the petitioner when he said Alicia received Workmen's Compensation from two (2) weeks after the accident. Opposing counsel was a gray haired man, and at the time he was a candidate for the New Mexico Supreme Court and according to his opening statement his family has been in New Mexico longer than Casey Luna dirt. (Casey Luna is the Lt. Governor of New Mexico).

Also, opposing counsel, during direct examination of Mody, coached Mody into false testimony, where Mody testified that he offered to pay to petitioner $1.95 for each guest of the motel if petitioner gave free coffee and donuts to these guests, and implied that petitioner did not accept this offer. (Volume II, Tr 63, line 24 thru Tr 64, line 7). This is an absolute premeditated lie to justify to the jury the reason why he gave free donuts and coffee to his guests in direct competition with petitioner's

restaurant despite the fact that the lease provided for petitioner an exclusive right to serve food on the premises. The fact is that at regular menu price, coffee was .60 cents and donuts were .65 cents each or a total of $1.25 for both. How can petitioner refuse $1.95 for the same items? Then respondent was coached when he testified that all motels on Central Avenue have the same problem with prostitution and drug traffickers. (Vol. II, Tr 64, 65, 66, 79) Based on newly discovered evidence, petitioner presented evidence that at the same period of time (3.5 months) the Trade Wind was cited for 62 prostitution, drug, and weapon related citations. Another motel, The De Anza, located at the next traffic light West of the Trade Wind, with comparable size and rates, did not even have one such citation. These were raised in post trial motions for a new trial and again before New Mexico Supreme Court. During the same testimony respondent several times associated himself with the ownership of a Travelodge

franchise to gain credibility when he said "I bought the Travelodge and I owned the Travelodge, and I sold the Travelodge." Petitioner presented newly discovered evidence in his post trial motion that proved Mody never owned a Travelodge. He bought a motel that used to be a Travelodge. This evidence (RP 197 thru RP 206) shows that in 1982 when Travelodge owned the motel, four police reports were filed at this location. After Mody bought this motel in 1983, the police reports started to increase in number and intensified in criminal activities. In 1986, three (3) years later, there were 44 police reports filed at this location, consisting of aggravated assault, prostitution, burglary, larceny, weapon offenses, auto theft and robbery, an increase of more than 1000 percent.

Opposing counsel also coached Margaret Thompson[3], to false testimony. (Vol. II, Tr 18)

---

[3] Margaret Thompson worked for Mody in managment capacity for many years and she overlooked all of Mody's motels.

Q. Did you see any advertising for the place?

A. Only when he ran the two-for-one special which he basically went out on the street and handed out to people. I think he once ran an ad in some small paper. I can't remember for sure what it was. I don't think it was the Tribune. It was kind of like a handout paper or Thrifty Nickel, something like that. But as far as advertising, there wasn't any except for his sign out front, that I know of.

Argument: The record in bills exhibit clearly shows that petitioner in 3.5 months spent in excess of $700.00 for advertising which is a considerable amount for that size of business. A total of fifteen (15) ads. Then she was led and testified that petitioner had only one regular customer at all times and she pointed at Benny Sedillo[4] in the court as that customer. She also was led to testify that her husband ceased work for petitioner, because petitioner did not have any business. The truth is that her

---

[4] Benny Sedillo was one of the petitioner's customers who testified that once there were tenents of motel sitting on top of his car and smoking marijuana. During the trial opposing councel contacted Benny Sedillo and asked him why he was there to testify.

husband was terminated due to tardines and being drunk on the job.

The opposing counsel also led Donald Phonix[5] to testify that petitioner never had any business and that he was food poisoned once when he ate at petitioner's restaurant. However, during cross examination, Donald Phonix testified that he did not remember whether or not he ate anything else that day anywhere else.

j) Decision, Appendix Page 5a, line 8 reads: "We will address appellant's issues in a different order than that used in his brief in chief. He attacks the trial court's findings of fact and conclusions of law, as well as the evidence of his mismanagement. He argues that the evidence did not support the trial court's decision. When we review a trial court's decision, we determine whether there is substantial evidence supporting the decision.
Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Toltec Int'l, inc. v. Village of Ruidoso, 95 N.M. 82, 84, 619 P. 2nd 186, 188 (1980). On appeal, we resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of a verdict and disregard all evidence and inferences to the contrary. Furthermore, we do not weigh

---

[5] Donald Phoenix is a single man who has lived at the Trade Wind for several years, with a mental disorder.

the evidence, nor do we foreclose a finding of substantial evidence. Id. Clovis Nat'l Bank v. Harmon, 102 N.M. 166, 168-69, 692 P. 2d 1315-18 (1984); see also Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P. 2d 156 (Ct. App. 1985).

After reviewing the record, we hold that there was substantial evidence to support the trial court's decision. The record clearly showed that Tabrizian leased restaurant space from Mody and then abandoned the premises, leaving the restaurant vacant for almost eight months. The damages--lost rent, fees, and costs--accurately reflected the losses suffered by Mody."

Argument: The evidence presented in Section c, d, e, and f proves that the New Mexico Supreme Court had not reviewed the record and therefore this section of the decision also is without merit, when it says we have reviewed the record. However, we will challenge the findings. The Trial court findings of fact and conclusion of law was bias: 1) because it was identical to the one submitted by opposing council and 2) because it was not supported by substantial evidence, at least because it did not deal with Count II thru Count V of petitioner's complaint in one fashion or another. These claims are recession, fraud, nuisance, and unfair trade

practices.

COUNT II - RECESSION

During the three and one half (3½) months that the petitioner operated his restaurant, the motel was cited for 62 criminal activities consisting of assault with a deadly weapon, drug overdose, rape, prostitution, child abuse, theft, drug arrest and two (2) separate prostitution related police undercover sting operations which resulted in very bad publicity. Paragraph 17 of the lease agreement is as follows:

> "Quiet Enjoyment and Termination
> Lessors agree with lessee that, condition upon lessee paying the rent herein provided and performing and fulfilling all the covenants, agreements, conditions and provisions herein to be kept, observed or performed by lessee, lessee shall and may at all time during the term hereby granted, peaceably, quietly and exclusively have, hold and enjoy the lease premises;"

a. Is this peaceable, quiet and exclusive use of the premises?

b. Did finding of fact and conclusion of

law deal with this issue? No.

c. Did jury instruction deal with this issue? No.

COUNT III - FRAUD

Alicia Aguero who worked as a housekeeper for the respondents for seven years, testified that, respondents knew about the drugs and prostitutes and he charged the protitutes more than normal and by the hour. However, credibility of this witness was shattered by opposing counsel when he misrepresented the facts in Section "i" infra

That, prior to entering into a lease agreement, the respondents knew that the Trade Wind Motel was frequented and was used as a center for criminal activities. That despite having knowledge of the criminal activities mentioned above, the respondents represented to petitioner that the restaurant he was leasing was ideal for a "family restaurant", and

represented to petitioner that the restaurant would provide an excellent income. Petitioner relied on the above mentioned representation of respondent and he agreed to lease the premises. That respondents wrongfully and intentionally induced plaintiff into entering the lease agreement and defrauded petitioner by failing to inform petitioner of the criminal activities.

a. Did finding of fact and conclusion of law deal with this issue? No.

b. Did the jury instruction deal with this issue? No.

COUNT IV- NUISANCE and COUNT V - UNFAIR TRADE PRACTICES

a. Did trail court deal with Count IV and Count V? No.

b. Did the jury instruction deal with any of these counts? No.

POINT II

The jury instruction question raised here was also raised before New Mexico Supreme Court in identical manners. Therefore, no change is made to this part of the argument and it is presented in identical form as it was raised below.

"The Trial Court Committed Reversible Error in Its Jury Instructions for Two Independent Reasons:

A. Trial Judge's failure to instruct jury on multiple counts were different points of law at action as error.

The trial court denied appellant/plaintiff requested instructions without any specificity, and instructed the jury on one charge only, Breach of Lease Agreement by the Modys. Five separate charges were made against the appellees/defendants in the original complaint: Breach of Lease Agreement for allowing prostitutes and drug traffickers to directly compete for customers (although the goods and services sold by these competitors were not the

same offered by appellant), to utilize the same restroom facilities, and use the same entrance to their place of trade as was granted to and used by appellant for a family restaurant; Recession rights because defendant could not provide exclusive use of his premises nor the reasonably expected and proffered public demand or traffic; fraud for failing to state material facts. He and his witness admittedly knew of concerning the competition for the premises, and they admit as follows: (Volume II, Tr 64 line 15 thru line 24) (Volume II, Tr 37 line 21 thru Tr 39 line 7), (Volume II, Tr 39 line 21 thru Tr 40 line 25), (Volume II, Tr 42 line 22 thru Tr 44 line 12), (Volume II, Tr 45 line 20 thru line 25), (Volume I, Tr 117 line 12 thru line 19), Volume II, Tr 117 line 12 thru line 19), (Volume I Tr 119 line 21 thru Tr 120 line 1), (Volume I, Tr 120 line 17 thru line 25).

The criminal nature of the competition and its often times fatal effects, nuisance for allowing what Bernalillo County residents look

poorly upon and that is the condoning of the congregation of prostitutes, pimps, and drug traffickers, unfair trade practices against Mody's failure to state material facts, intent to not provide exclusive rights of trade at the leased premises, and use of exaggerated promise of public demand for appellant goods. Although these separate counts may have certain casual connections, e.g., fraud is reason for rescission or as a factor in a charge of violating the Uniform Trade Practices Act, 57-12-1 to 12-22, NMSA 1978. Breach of Lease Agreement as enumerated in the original complaint does not need a proof of fraud for a finding of breach. Neither is the count of violating the Uniform Trade Practices Act, infra., dependent upon a finding that defendant's allowance of obvious criminal activity and black market or underground competition deprived Plaintiff of exclusive possession and trade rights.

Rule 1-051 of the Uniform July Instructions,

Civil in Paragraph B states, "The Court shall instruct the jury regarding the law applicable to the facts in the cause unless such instructions be waived by the party." Attorney for appellant did not waive instructions that would have covered all points of law applicable to this case, rather counsel for Plaintiff-Appellant offered sufficient damages instruction (RP106 thru RP 133) and objected to denial of said instructions. Furthermore, pursuant to Paragraph I of Rule 1-051, objection was made to error in instructions. Appellant is a layman, an average man on the street, so to speak, untrained in law. He can only present to the learned and Honorable court his perceptions of the law in relation to a layman's narrow field of experience with the law. Appellant now includes a pro se study of five issues of law, judicial conduct, and very difficult and precise Appellate procedure. What is presented here is a layman's argument concerning jury instructions. Jury instructions may be a very

common subject to the court, but to a jury and to Plaintiff, all lay persons, the subject generally comes into their lives only once. As the issues and key points are presented here, they are done in the view of the Appellant, most likely his peers would have a similar view.

Appellant has stated above that he believes the trial court is mandated to give full and complete instructions to the jury. In Garcia vs. Bakers Supermarket, 81 NM 92, 96 (ct. App. 1969), it states, "Denial of requested instructions is not error when court gives instructions adequately covering issues...nor is it material that one instruction did not contain all the elements of the defendant's requested instruction if all instructions given fairly present the issues and the law applicable thereto." Plaintiff is not arguing the instructions just because his were denied. Certainly counsel for the defendant will argue that the single instruction for breach of lease was adequate to cover the issue of fraud. He

will probably also say to the court that the lone instruction of breach of lease fairly covers the law applicable to nuisance. Appellant does not believe that one instruction alone adequately covered all issues beyond that of the breach of lease. The points of law concerning breach are not all applicable to the remaining separate counts. Furthermore, it appeared to Appellant that the trial court was dropping all counts against the defendants, except the breach. It seemed too unclear, too ambiguous. Appellant believes, "The function of the jury instruction is to make issues that the jury is to determine plain and clear. "Embrey vs. Galintin, 76 NM 719, 418 p 2nd 62 (1966)." (Emphasis added) Armstrong vs. Industrial Electrical & Equipment Services, 92 NM 272, 275, (ct App. 1981), and Casarez vs Garcia 99, NM 508 (ct App. 1983). The breach of lease alone is very complex to Appellant, especially in that the defendant did retain possession and control of part of the lease premises. In this case as

seen in the lease agreement paragraph 14, and (Volume I, Tr 117 line 24 thru Tr 118 line 15), the defendant retained control and shared use of the parking areas, restrooms, and a common entrance. In Strong vs. Shaw, 96 NM 218 (App.) a tenant sued his Landlord for starting a fire which destroyed the tenant's property, as dangerous a condition as allowing prostitutes, drug traffickers, and gun runners to congregate. In Strong supa,"...the rule is that if a Landlord retains possession or control of a portion of the lease premises, he is charged with the duty of exercising ordinary care in maintaining the retained portion." (Additional cites committed). In the eyes of the Appellant, ordinary care would include compliance with city ordinances which deal with criminal activities, and creation of nuisance (again a connection between two separate charges). It appears that Landlord's obligation to maintain compliance with city ordinances has been recognized for quite some time in New Mexico case law, such a

case is Melani vs. Haley, 53 NM 327, 333, 334. There the court found that defendants failure (Landlord) to comply with ordinances precluded any defense that the condition existed prior to the lease agreement. In the instant case, defendants and their witnesses admitted in open court (Volume II, Tr 65 line 12 thru Tr 66 line 21), (Volume II, Tr 39 line 21 thru Tr 40 line 25) that he was aware of the violations prior to and during the lease to Plaintiff. Those violations being prostitution on the premises, drug trafficking on the premises, and other criminal activities on the premises. Activities which included 62 prostitution, narcotics and weapons related citations just for the period May 1988 to August of 1988. Even the witnesses for the defense stated that the criminal activities around the Trade Wind were very evident and occurred in the areas shared by the Lessor and Lessee. (Volume II, Tr 37, line 21 thru Tr 45, line 25), (Volume I, Tr 117, line 21 thru Tr 45 line 25), (Volume I, Tr 117, line 12

thru Tr 120 line 25). Defendant did not provide substantial evidence that he was in compliance with the lease agreement concerning exclusive possession, nor that premises were maintained in compliances with city ordinances to protect the peace and quiet necessary for a restaurant catering to families.

On the second charge of Rescission it appears that it may be dependent upon a breach of contract. Not just a mere breach, but something quite a bit more substantial like fraud or unfair trade practices which make it impossible for the agreement in question to stand on its own; a condition where performance would not be possible. Bank of New Mexico vs. Northwest Power Products, 95 NM 743 (App.). According to instruction 13-814 Uniform Jury Instruction - Civil, Rescission is not to receive an instruction. It is supposed to be an equitable remedy tried by the court without a jury. So what do we do here? Was rescission really what was asked in the complaint or was it discharge

due to impossibility of performance? Maybe it was excused from performance caused by the hinderance of defendant allowance of criminal activity and non-exclusive possession. Regardless, rescission itself needs more than a mere breach. It needs something strong, like Count III fraud, which received no jury instruction.

Fraudulent misrepresentation, instruction 13-820, was not asked for by either party nor treated by the trial court, and neither did counsel for Appellant waive the instruction. In fact, Appellant sees the objection to the use of only one instruction as a preservation of instruction 13-820. The reasoning is twofold. First, the trial court is required to use U.J.I. when there is an applicable instruction, and it apparently chose not to, but gave no specific reasoning. In fact, the trial court never made any in-court or on-the-record determination of the charge of fraud. (Alternatively, it might even be said that this appeal is early since no

final judgment has been rendered on the original complaint). Secondly, if the trial court would have said something or done something with the fraud charge, the Appellant would have been given the opportunity to object. Additionally, the evidence in the record is substantial to prove all four elements of fraud, especially when compared with evidence and admission of the defendants.

There is no instruction in the U.J.I. for nuisance, but neither is there an instruction for Breach of Lease Agreement. So Appellant must diverse a bit here to the Criminal Code of Albuquerque, Public Nuisances, 12-1-2-22,A, "Being concealed upon any property of another without lawful business with the person in lawful possession of the premises." It could be applicable to the parking area and restrooms shared by Mody and Tabrizian. While we are here in the city ordinances, it must be noted that 12-1-4-13,E, Lewd or Immoral Acts. "Knowingly permitting any place which a person partially or

wholly owns or controls to be used as a house of prostitution." Appellant knows it is probably bad practice to jump around in an argument, but as a pro se litigant, he has to state that there was no way he could comply with Albuquerque city ordinance as required by his lease agreement. Why? Because defendant by his own admission was aware of and allowed violations on the shared premises, and his own exclusive premises, the Trade Winds Motel. This contributed to creating a nuisance as it is defined in Black's Law Dictionary. "Nuisance is that activity which arises from unreasonable, unwarranted or unlawful use by a person of his own property... and producing such material annoyance, inconvenience, and discomfort that law will presume resulting damage. State ex.re. Herman vs. Cordon, 23 Arizona App. 78, 530, p2d, 1115, 1118." Additionally, maintaining a nuisance. To maintain a nuisance means something more than having knowledge of its existence; it means, in addition, preserving and continuing its

existence whether by some positive acts or by acquiescence, People vs. Campbell, 45 Misc. 2d 201, 256, NYS, 2d 467. As previously stated, defendant admitted to knowledge of the criminal activity, admitted to doing nothing about it, and preserved it by allowing police sting operations to take place in this well known center of criminal activity. So where did the trial judge treat this issue? Nowhere! Not as a special jury instruction and not as a matter of record decided by the court.

Unfair Trade Practice, 57-12-2,C Definitions (10) "Offering goods or services with intent not to supply reasonable expectable public demand." In a legitimate family oriented business a certain type of consumer is expected at a certain rate of traffic. Family oriented business in a high crime rate area, especially crimes involving moral turpitude, will fail due to moral conscience of potential customers - the family customers will stay away. This should be obvious from Albuquerque's history of zoning

regulations for liquor establishments and pornography suppliers. The community will not tolerate prostitution as evidenced by periodic police sweeps of areas know as centers of such trade. Subsection 114 or 57-12-2,C "using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so, deceives or tends to deceive." This violation has been admitted to by defendant and even if the trial court were to look at this as much less than fraud, or if the trail court felt that all four elements of fraud were not put strongly enough by proof presented, the admittance by the defendant should have a least warranted comment. The trial court did nothing about this charge-no jury instruction, no adjudication. The trial court's apparent view of the law and the facts presented are not consistent with what the Appellant has learned.

B. Trial Court Committed Reversible Error By Not Instructing on Counterclaim, Denial of Trial by Jury.

In defence counsel's opening statement to the trial court and jury, he stated at (Volume I Tr 68 line 3 thru line 15) that he would present evidence to the jury and the court, which would prove defendant's counterclaim. The counterclaim said that Plaintiff breached the lease agreement herein discussed, a claim exactly the opposite of Count I in Appellant's original complaint against Mody. If these claims are essentially based on the same points of law, why shouldn't they both be heard by the jury? There are U.J.I. instructions for counterclaims although none are listed for breach of lease agreement. In fact, looking in Uniform Jury Instructions-Civil, Appendix 1. Contracts; Counterclaims, appellant found an interesting correlation between the example given and the instant case. If one were to imagine a reversal of defendant and plaintiff, envision the ranch as a restaurant, the steers as customers, the lack of water and grass as the nuisance and ill repute created by the whores and drug peddlers, you have the

scenario of Tabrizian v. Mody. Both parties claim to be wronged in similar ways - misrepresentation of expected profitability claims, abandonment of lease premises, failure to state short comings created by adverse conditions plaguing the premises - very similar cases. Appellant could not believe there were 22 suggested instructions provided all in neat order as recommended. Fraud was not even in there, nor was breach of lease. Why attorney for Appellant did not follow this simple outline to justice is understandable because he is not expected to be as wise as a judge, especially when it comes to justice. Counsel for Appellant did come close though, for he at least provided a request for instructions very similar in large part to what is suggested in particular with this issue of a counterclaim instruction. Therefore, it cannot be said that counsel for plaintiff/appellant did not do his advocate's job. He certainly did not foreclose this appeal of errors by the trial court for its refusal to

give a particular instruction. In the instant case it was the trial judge who failed to provide the jury with instructions that more clearly and more adequately covered all the points of law, including the counterclaim instruction the jury was told it would get. This action denied Mr. Tabrizian his right to trial by jury as requested.

POINT III

Appearance of Biased and Prejudice by Trial Court is based on the following grounds. On August 6, 1990, immediately before trial started, about 9:00 am, Petitioner/Plaintiff and his attorney met with respondents/defendants and their attorney in a small jury room, at the respondents request. At this meeting, the respondent asked petitioner to withdraw the complaint and petitioner refused, then the respondents and their attorney left the room and Judge Cosgrove came in. He recommended that the petitioner to compromise and wash off the case. When petitioner refused, Judge Cosgrove said,

"The jury trial is very expensive and it cost lots of money to bring that many people to court and it is possible that you would lose, then you will be mad at everybody, the Judge, the attorney, the jury." The petitioner replied "What about the principal, Paragraph 17 of the lease says that I am entitled to peace and quiet enjoyment of the premises, and I did not have that, that Motel was a whore house which means Mody has breached the lease." Judge replied "I know what that means, you don't have to tell me what that means, you need to know what that means." and he continued,"The other side of the coin is that they are saying you didn't make it because you didn't know what you were doing." and he continued to plead on behalf of the respondents as if he was their attorney.

Immediately petitioner felt that the Judge was biased, in favor of the respondents and felt that he was not going to get a fair trial.

At another time, during the post trial hearing on October 25, 1990, at the beginning of

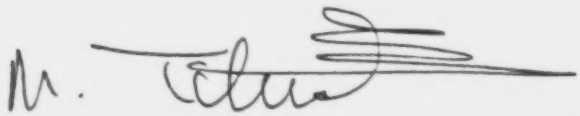
this hearing, as the opposing counsel was entering into the court, he charged at petitioner with his finger raised at petitioner and said, "If you one more time file a motion like this, I'm going to get you. You are a creep". At this point, trial Judge interfered and said to petitioner, "I'm going to send you to jail if this doesn't stop."

This prejudice is reflected in the jury instruction and in finding of fact and conclusion of law described in Point II, and Section "i" of Point I, in Questions are Substancial.

CONCLUSION

For these reasons, this court should note probable jurisdiction of this Writ of Certiorari.

Respectfully submitted,



MEHRDED TABRIZIAN
4700Brockwood NE
Albuquerque,NM 87109
(505) 883-9529
pro se

I hereby certify that I
mailed a true and correct
copy of the foregoing to counsel
of the record on this
19th day of February, 1992.

Keith Franchini
P.O. Box 25167
Albuquerque, New Mexico 87125-5167

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MEHRDAD TABRIZIAN, d/b/a EL SOMBRERO RESTAURANT,

Plaintiff-Appellant,

vs. No. 19,477

BHARAT MODY and CHAMPA MODY d/b/a TRADE WINDS MOTOR HOTEL and TRADE WINDS MOTOR HOTEL, INC.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

Burt Cosgrove, District Judge

Mike Tabrizian
Albuquerque, NM Pro Se

Keith Franchini
Albuquerque, NM for Appellees

DECISION

MONTGOMERY, Justice.

This is an appeal from a judgment against appellant for breach of a real estate rental agreement. Appellant advances six arguments as his basis for appeal: (1) The

trial court erred by failing to use appellant's proposed jury instructions; (2) the trial court erred by denying appellant's requested findings of fact and conclusions of law; (3) the trial court's appearance of bias and prejudice against appellant requires reversal; (4) opposing counsel's treatment of appellant's witness constituted grounds for a new trial; (5) the evidence was insufficient to prove that appellant's business failure was caused by his own mismanagement; and (6) the trial court erred when it refused to rule on two post-trail motions because it lacked jurisdiction. We affirm the trial court's decision.

On April 19, 1988, appellant, Mehrdad Tabrizian, signed a rental agreement for restaurant space adjacent to the Trade Winds Motor Hotel. Bharat Mody, appellee, was the owner and landlord of both the motel and the leased space. Tabrizian planned to open a

family-style Mexican restaurant called "El Sombrero." He spent approximately $7,000 improving the premises and within two months opened the restaurant. At first the business seemed to prosper; however, in August of 1988 Tabrizian suddenly closed his business and abandoned the lease.

On August 30, 1988, Tabrizian filed a complaint for breach of contract, rescission, fraud, nuisance, and unfair trade practices. Mody filed an answer and a counterclaim alleging nonpayment of rent. A jury trial was held on Tabrizian's claims; Mody prevailed. The counterclaim was tried to the bench, and the court awarded Mody a judgment of $15,341.79 (subsequently amended to reflect the amount previously paid by Tabrizian in the form of the last month's rent).

Tabrizian filed a motion for new trial on August 24, 1990, and a notice of appeal on September 17. 1990. He filed another motion

for new trial on September 18, 1990. On October 25, 1990, the trial court held that the filing of the notice of appeal terminated its jurisdiction to hear the motions. Tabrizian now appeals the trail court's decision.

Before we begin our analysis, we observe that appellant's decision to forego the services of an attorney to assist with his appeal has resulted in briefs that are, by and large, confusing and unhelpful. Repeatedly, appellant has reminded us that he is unschooled in the law and has suggested that, as a result, he should be accorded special consideration. However, under our decisions a pre se party is held to the same standards as are licensed attorneys. State ex rel. Highway Comm'n v. Sherman, 82 N.M. 316, 318-319, 481 P.2d 104, 106-07 (1971). We have endeavored to give appellant's position the same consideration as if it had been

presented by an attorney, and we have tried to insure that appellant has not been disadvantaged by his pro se presentation. Nevertheless, his briefs undoubtedly would have been more understandable and, possibly, more persuasive had they been prepared by an attorney.

We will address appellant's issues in a different order than that used in his brief in chief. He attacks the trial court's findings of fact and conclusions of law, as well as the evidence of his mismanagement. He argues that the evidence did not support the trial court's decision. When we review a trial court's decision, we determine whether there is substantial evidence supporting the decision.

> Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Toltec Int'l, Inc. v. Village of Ruidoso, 95 N.M. 82, 84, 619 P. 2d 186, 188 (1980). On appeal, we resolve all disputed facts in favor of the successful party, indulge all

> reasonable inferences in support of a verdict and disregard all evidence and inferences to the contrary. Furthermore, we do not weight the evidence, nor do we foreclose a finding of substantial evidence. Id.

Clovis Nat'l Bank v. Harman, 102 N.M. 166, 168-69, 692 P. 2d 1315, 1317-18 (1984); see also Sanchez v. Homestake Mining Co., 102 N.M. 473, 697 P. 2d 156 (Ct. App. 1985).

After reviewing the record, we hold that there was substantial evidence to support the trail court's decision. The record clearly showed that Tabrizian leased restaurant space from Mody and then abandoned the premises, leaving the restaurant vacant for almost eight months. The damages--lost rent, fees, and costs--accurately reflected the losses suffered by Mody.

Additionally, while Tabrizian presented some evidence of drug use and prostitution at the Tradewinds Motel, there was no evidence that Mody actively promoted or condone the illegal activity. The police neither charged

nor investigated Mody for any criminal activity. In fact, the evidence convincingly showed that Mody fully cooperated with the police in their efforts to halt the crime at the motel. Although there was evidence of bad feelings between the parties, there was no evidence that Mody tortiously interfered with Tabrizian's business. Instead, the evidence supported a finding that Tabrizian abandoned the restaurant without any provocation by Mody.

Finally, the evidence supported a jury finding that Tabrizian's business failure was due to his own inexperience and mismanagement. The record indicated that Tabrizian had prior restaurant management experience but had never run his own business. Mody presented evidence of prior and current restaurants that succeeded in the space vacated by Tabrizian, supporting the argument that the motel and its owner were

not the cause of Tabrizian's misfortunes. There is substantial evidence to support the trial courts decision and we will not reverse. Clovis Nat'l Bank, 102 N.M. at 168-69, 692 P. 2d 1315, 1317-18.

Tabrizian next argues that he was prejudiced by the trial court's failure to adopt his proposed jury instructions and by inappropriate actions of the trial judge and of opposing counsel. But any claims of error of this sort must have been preserved at trial. SCRA 1986, 12-213(A); Woolwine v. Furr's. Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987)("To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trail court on the same grounds argued in the appellate court."). Tabrizian failed to object both to the trial court's failure to use his jury instructions and to the alleged prejudicial actions of the judge and opposing

counsel.[1] Therefore, Tabrizian failed to properly preserve the error for appeal and we have nothing to review.

Finally, Tabrizian claims that the trial court's decision that it had no jurisdiction to rule on his motions for relief from judgment was prejudicial. There is confusion on this issue, because the record proper clearly shows that Tabrizian filed only post-trial motions for a new trial, pursuant to SCRA 1986, 1-059.

At the final post-trail hearing, the nature of Tabirizan's motion also confused the trail court and opposing counsel. Tabrizian stated that he was filing a Rule 60 motion. Opposing counsel thought that Tabrizian may have also filed a Rule 59 motion. However, the type of motion appellant

---

[1] Moreover, we have read the transcript of the proceedings and do not find any evidence of improper behavior by either the judge or opposing counsel.

filed is irrelevant because the trial court did not have jurisdiction to hear the motions.

When Tabrizian filed his notice of appeal, the trial court lost jurisdiction to decide motions of this sort, whether filed before or after the notice of appeal. Selgado v. Commercial Warehouse Co., 88 N.M. 579, 544 P.2d 719 (Ct. App. 1975). In Selgado, the court of appeals affirmed an award of damages arising from an automobile accident. In a post-trail motion, defendants moved for a new trial. However, before the trial court could act on the motion, defendants filed a notice of appeal. In affirming the damage award the court of appeals stated: "By serving the notice of appeal, the defendants abandoned the motion by depriving the trial court of jurisdiction." Id. at 582, 544 P.2d at 722; see also Devlin v. New Mexico State Police Dept., 108 N.M. 72, 74, 766 P.2d 916, 918

(1988) ("a notice of appeal ordinarily divests the trial court of jurisdiction to take any further action in the matter") Because it lacked jurisdiction, the trial court correctly refused to rule on Tabrizian's motions.

Alternatively, even if the trial court had jurisdiction, it had denied the motions pursuant to NMSA 1978, Section 39-1-1 (Repl. Pamp. 1991). The statute provides in relevant part:

> Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty days after the entry thereof[;]...<u>if the court shall fail to rule upon such motion within thirty days after the filing thereof, such failure to rule shall be deemed a denial thereof</u>.

<u>Id.</u> (emphasis added).

Appellant filed two separate post-judgment motions, on August 24, 1990, and on September 18, 1990. The trial court did not hear the motions until October 25, 1990, more

than thirty days after the filing of the second motion. Therefore, both motions were deemed to have been denied. Montgomery Ward v. Larragoite, 81 N.M. 383, 386, 467 P.2d 399, 402 (1970) (applying thirty-day rule to both jury and nonjury decisions); Chavez-Rey v. Miller, 99 N.M. 377, 380-81, 658 P. 2d 452, 456 (Ct App. 1982) ("The failure to rule within thirty days of the filing the motion for new trail constituted a denial of the motion by operation of law."), cert.denied, 99 N.M. 358, 658 P. 2d 433 (1983).

In Conclusion, the trial court was correct. There was substantial evidence to support its decision. Appellant failed to preserve his claims of error below on the issue of the jury instructions and the allegedly improper acts of the judge and opposing counsel. The Trial court was without jurisdiction to act on any of appellant's post-trial motions and in any event had

denied the motions pursuant to Section 39-1-1.

The judgment is affirmed.

IT IS SO ORDERED.

SETH D. MONTGOMERY, Justice

WE CONCUR:

RICHARD E. RANSOM, Chief Justice

JOSEPH F. BACA, Justice

IN THE SUPREME COURT OF THE STATE

NEW MEXICO

MANDATE NO. 19,477

IN THE STATE OF NEW MEXICO TO THE DISTRICT COURT sitting within and for the County of Bernalillo, GREETING;

WHEREAS, in a certain cause lately pending before you, numbered CV 88-06597, in your Civil Docket, wherein Mehrdad Tabrizian, d/b/a El Sombrero Restaurant was Plaintiff and Bharat Mody, et al., were Defendants, by your consideration in that behalf judgment was entered against said Plaintiff; and

WHEREAS, said cause and judgment were afterwards brought into our Supreme Court for review by said Plaintiff by appeal, whereupon such proceedings were had that on November 27, 1991, a Decision was entered by said Supreme Court affirming your judgment aforesaid and remanding said cause to you.

NOW, THEREFORE, this cause is hereby

remanded to your for such further proceedings therein as may be proper, if any, consistent and in conformity with said Decision of the Court.

WITNESS, The Hon. Richard E. Ransom, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 13th day of December, 1991.

Rose Marie Alderete, Clerk
Supreme Court of New Mexico

_____
By Deputy

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

TABRIZIAN MEHRDAD, d/b/a/
EL SOMBRERO RESTAURANT,
Plaintiff,

vs. No. CV 88-06597

BHARAT H. MODY and CHAMPA MODY
d/b/a TRADE WINDS MOTOR HOTEL, INC.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court makes the following Findings of Fact and Conclusions of Law after trial on the merits. The Court has reviewed the parties requested findings and conclusions. All requested findings of fact and conclusions of law inconsistent with those made by the Court are refused.

FINDINGS OF FACT

1. All parties are residents of the County of Bernalillo, State of New Mexico.

2. Plaintiff entered into a lease for the premises, located at 5400 Central SE, with Defendants, for the purposes of running a restaurant.

3. That on or about August 14, 1988, Plaintiff abandoned the premises.

4. The leased premises remained empty

from August 14, 1988, until April 1, 1989, when the premises were re-leased.

5. The unpaid rental for the premises was the sum of $1,300.00 per month for the months of September and October, 1988, the sum of $1,700.00 per month for the months of November and December, 1988, and the sum of $2,000.00 per month for the months of January, February and March, 1989, for a total of $12,000.00.

6. Plaintiff has expended costs of $341.79 and attorney's fees in this case of $3,000.00 including tax, which are recoverable against Plaintiff lessee pursuant to Clause 16 of the lease.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this suit.

2. Plaintiff has breached this lease with Defendants.

3. Defendants should have judgment

against Plaintiff in the sum of $12,000.00 for unpaid rent, and for the sum of $3,000.00 for attorney's fees and tax, as well as the sum of $341.79 for costs.

DECISION

Judgment should be awarded in conformity with these findings and conclusions.

_____
Burt Cosgrove, Div. IX
District Court Judge,

CBC:pcm

xc: Gene E, Franchini, Esq.
707 Broadway NE, Ste 100
Post Office Box 25167
Alb., N.M. 87125-5167

Melvyn D. Baron, Esq.
110 Quincy, NE
Alb., N.M. 87108